86-660
No.

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1986

D. SUZANNE BRUCE,

Petitioner,

V.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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## QUESTION PRESENTED

WHETHER ALLOWING THE GOVERNMENT TO USE "SECRET SETTLEMENTS" TO MITIGATE THE PENALTY OF REMOVAL IMPOSED AGAINST SOME, BUT NOT ALL, EMPLOYEES FIRED FOR STRIKING AGAINST THE FEDERAL GOVERNMENT ABROGATES THE EQUAL TREATMENT GUARANTEES OF THE CIVIL SERVICE REFORM ACT AND THE UNITED STATES CONSTITUTION.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

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D. SANDRA BRUCE,

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## QUESTION PRESENTED

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reprinted in the Appendix to this petition and is an unpublished decision of the Court. The opinions of the United States Merit Systems Protection Board are reprinted in the Appendix to this Petition. The Bergh v. Department of Transportation, FAA, decision on which the Court below based its decision in this case is also reprinted in the Appendix.

## JURISDICTION

The opinion and judgment of the Court of Appeals was entered on July 18, 1986 and the jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## STATUTES AND REGULATIONS

**5 U.S.C. Section 2301(b):**

> Federal personnel management should be implemented consistent with the following merit system principles...
>
> (2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.
>
> (8) Employees should be
>
> (A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes...

**5 U.S.C. Section 7703(c):**

> In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency actions, findings, or conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;...

**5 U.S.C. Section 7311:**

> An individual may not accept or hold a position in the Government of the United States...if he ... (3) participates in a strike ... against the Government of the United States...

## STATEMENT OF THE CASE

Petitioners, air traffic controllers employed by the U. S. Department of Transportation, Federal Aviation Administration, [hereinafter FAA], were fired for striking against the government in August 1981. Before the Merit Systems Protection Board and Court of Appeals for the Federal Circuit, Petitioners, among other arguments, alleged the removal for striking was in violation of the equal treatment guarantees found in the Merit System Principles of the Civil Service Reform Act and the Fifth Amendment Equal Protection Clause of the U.S. Constitution. The claimed

denial of equal treatment was based upon the Government's entering "secret settlements" which mitigated the penalty of removal imposed against some, but not all, of the employees who were fired for striking in August 1981. The Court of Appeals and Merit Systems Protection Board rejected Petitioner's contentions and denied Petitioner's request to reopen the record for additional discovery and admission of evidence regarding the settlements with similarly situated employees.

The only issue presented in this case which had not previously been decided by the Court of Appeals in other air traffic controller appeals was: Whether the record should be reopened for discovery and introduction of evidence which might prove the government violated

petitioner's constitutional and statutory rights to equal treatment for similar offenses when it entered into secret settlements with a number of controllers fired for striking and reduced their removal to a suspension without pay for being Absent Without Leave (AWOL). The Court of Appeals denied the appeal based upon its July 2, 1986 ruling in Bergh v. Department of Transportation, FAA, 794 F.2d 1575. (Appendix D). In Bergh the Court basically ruled that the requirements of the Civil Service Reform Act of 1978 guaranteeing equal treatment of employees do not apply to settlement agreements which reduce penalties previously imposed. The Court concluded that the law favors settlement of cases and overlooked the prior law requiring the government to prove by a preponderance of the

evidence that there were legitimate reasons for disparate treatment once an employee-appellant alleges disparate treatment in comparison with other employees.

The facts which first gave rise to Petitioner's claim of disparate treatment was counsel's discovery in November 1982 that a number of controllers who were fired and had appealed their firings to the MSPB had their appeals dismissed without explanation. Subsequently, a Freedom of Information Act lawsuit filed against the FAA in the United States District Court for the Western District of Tennessee, Civil Action No. 83-2315-HA, W.D. Tenn. (1983),(reported at 580 F.Supp. 984 (1983), resulted in a court order denying the government's claim of exemption of the settlements from the

FOIA. Subsequent production of 123 redacted files by the government verified that federal employees fired for striking had their removal reduced to a suspension without pay for being Absent Without Leave after they appealed their removal to the MSPB. Reasons for the lesser penalties being imposed against these strikers have not been disclosed by the government. The request to reopen the record and allow further discovery and introduction of evidence relating to these settlements was denied upon a ruling that the evidence was not relevant. The Court below reviewed the MSPB decision pursuant to 5 U.S.C. Section 7703. The MSPB review of Petitioner's appeal of the termination decision was pursuant to 5 U.S.C. Section 7513(d) and Section 7701.

## REASONS FOR GRANTING WRIT

The Court of Appeals for the Federal Circuit decided a question of law which affects the rights of every federal government employee under the Civil Service Reform Act of 1978 and which has not, but should be, settled by this Court. The Court denied requests to reopen the record below for discovery concerning alleged "secret settlements" entered between the FAA and certain other air traffic who had, like Petitioners, been fired for striking in August, 1981. The Court denied the request based upon its opinion in Bergh v. Department of Transportation, FAA, wherein the Court ruled in effect that disparate treatment in discipline which results from settlement of cases before the Merit Systems Protection Board does

not violate the prohibitions against disparate treatment in discipline found in the Civil Service Reform Act and the United States Constitution.

## I. FAILURE TO GRANT THE WRIT WILL RENDER THE EQUAL TREATMENT GUARANTEES OF THE CIVIL SERVICE REFORM ACT AND THE U. S. CONSTITUTION MEANINGLESS.

The decision of the U.S. Court of Appeals for the Federal Circuit in this case, relying on its decision two weeks earlier in Bergh v. Department of Transportation, FAA, 794 F.2d 1575 (July 2, 1986), has the effect of reversing the prior rule of law which required government agencies to prove by a preponderance of the evidence that there were legitimate reasons for disparate treatment of employees for similar alleged misconduct. Woody v.

General Services Administration, 6 MSPR 468, 488 (1981); Douglas v. Veterans Administration, 5 MSPR 280, 306-7 (1981); Bivens v. TVA, 8 MSPR 458, 463 (1981); Washington v. TVA, 8 MSPR 27, 29 (1981); Filip v. Veterans Administration, 15 MSPR 329, 333 (1983); Drummer v. GSA, 22 MSPR 432, 434 (1984); Wilson v. U.S. Postal Service, 21 MSPR 490 (1984).

The Court in Bergh concluded that

> Woody and Douglas, however, are inapposite because they deal solely with the question whether the penalty the agency selected was proper. The alleged disparate treatment here, however, does not involve any difference in the penalty imposed upon different employees -- all the air traffic controllers involved were removed -- but turns upon the propriety of the Administration's settling some of the cases before the Board by reinstating some controllers, and not explaining the reasons why it also did not enter into like settlements with the petitioners.

Appendix D. In addition, the Court concluded that the explanation of counsel for the agency in its brief to the Court of why it reduced the removal penalty for some controllers met the Government's burden and that settlements were to be encouraged. If these rulings of the Court of Appeals are allowed to stand, then the government in the future will be allowed to routinely make "end runs" around the equal treatment guarantees of the Civil Service Reform Act of 1978 and the equal protection guarantees of the U.S. Constitution. Obviously, to avoid the Woody and Douglas burden of proof when disparate treatment is alleged by an employee who has been disciplined, all the government will have to do is provide equal penalties initially and then enter secret settlement the next day

with the favored employee reducing or eliminating the penalty imposed.

The intent of the Congress and the President of the United States in the enactment of the landmark Civil Service Reform Act of 1978 was mainifestly clear: to remedy serious defects in the Nation's Civil Service System, especially continuing abuses of the "merit system" first set up by the Pendleton Act of 1883. As the Court of Appeals for the Federal Circuit stated in Schapansky v. Dept. of Transp., FAA, 735 F.2d 477, 485 (1984), "Ideal justice, and government personnel regulations, envisage equal treatment of persons similarly situated". To ensure that this ideal justice is attained the Civil Service Reform Act was amended in 1978 to correct some of its earlier weaknesses.

Remedial legislation regulating the conditions of employment (like the Civil Service Reform Act and the Fair Labor Standards Act) is to be liberally construed "in favor of the workers whom it was designed to protect" with an eye toward carrying out the intent of Congress and the will of the people in passing enactments to remedy past abuses. Wirtz v. Ti Ti Humus Company, 373 F.2d 209 (4th Cir. 1976), citing Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945).

The recent MSPB BREAKING TRUST report concluded that the merit system principles and prohibited personnel practices, "Taken together ... constitute a sort of 'Magna Charta' or constitution of federal employment law. BREAKING TRUST, Prohibited Personnel Practices in the

Federal Service, Director's Monograph, U. S. Merit Systems Protection Board Office of Merit Systems Review and Studies, February 1982 at 1, hereafter cited as BREAKING TRUST. That "Magna Charta or constitution" has been violated through the secret settlements and now sanctioned by the Court's decision below.

While the U. S. Government gave the impression to the world that all striking air controllers who failed to return to work by their deadlines were permanently fired, that same Government gave favorable treatment and special consideration to at least 123 air traffic controllers by reintstating them after they went on strike, were fired for doing so, and had appealed their firings to the MSPB. Norwood v. FAA, 580 F. Supp. 984 (W.D. TN. 1983). For the 123 the

penalty of removal for striking was reduced to a suspension without pay for being Absent Without Leave and implemented through secret settlement agreements. Id.

The "secret settlements" were learned of by Petitioner's counsel for the first time in November 1982 when he became aware of the dismissal, without explanation, of several cases pending before the MSPB. Each of these cases involved air traffic controllers fired for striking in August 1981. They were fired only after having had an opportunity to respond to the charges of striking and having had those defenses rejected by the FAA. That the secret settlements were entered was later verified through a Freedom of Information Act lawsuit filed by counsel for Petitioner in the United States

District Court for the Western District of Tennessee. Norwood v. Federal Aviation Administration, 580 F. Supp. 994 (W.D.TN. 1983). The Honorable United States District Court Judge Odell Horton granted a motion for partial summary judgment for the Plaintiff in that case, rejecting all of the Government's claims that these settlements were exempt from disclosure under the Freedom of Information Act and ordering that the Government release the inculpatory documents based on there being a "strong public interest in ascertaining whether the agency authorized to deal with the Nation's aviation safety handled matters surrounding the strike in a fair and consistent manner." (emphasis added) Id.

Petitioner suggested below that

secret settlements in fedeal personnel management violate two of the merit principles, to wit:

> Federal personnel management should be implemented consistent with the following merit system principles:...
>
> (2) All employees and applicants for employment should receive **fair and equitable treatment in all aspects of personnel management** without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and **with proper regard for their privacy and constitutional rights**
>
> (8) Employees should be
>
> (A) **protected against arbitrary action, personal favoritism,** or coercion for partisam political purposes.

5 U.S.C. 2301. (Emphasis added) Under 5 U.S.C. § 7701(c)(2)(B), any agency personnel decision, even assuming arguendo it is supported by a preponderance of the evidence, must be reversed where the employee shows that

the decision was based on any prohibited personnel practice. Clearly, agencies act illegally, arbitrarily and capriciously when they dispense unequal penalties for equal offenses. In one case, a United States Tennessee Vally Authority employee was fired for possession of a firearm on TVA property -- while other TVA employees found with firearms were merely given warning letters. The Merit Systems Protection Board held in that case that where rules are inconsistently applied, agency decisions to remove employees will be overturned. Washington V. Tennessee Valley Authority, 8 MSPR 27, 29 (1981).

In another MSPB-TVA case involving illegal, arbitrary and capricious discrimination in the form of unlike penalties for like offenses, two employees were fired for removing

TVA equipment, for unauthorized use of TVA equipment, and for other offenses. Before the MSPB, the fired TVA employees produced unrebutted evidence that other similarly situated employees were given less severe penalties. The Merit Systems Protection Board ordered the less severe 60 day suspension be imposed instead of the unequal and discriminatory firing. Bivens and Marshall v. Tennessee Valley Authority, 8 MSPR 458 (1986). The Board continued to follow this rule in Filip v. VA, 15 MSPR 329, 333 (1983); Drummer v. GSA, 22 MSPR 432, 434 (1984); Wilson v. U.S. Postal Service, 21 MSPR 490 (1984).

Because the MSPB denied the request for discovery of and thereafter introduction of evidence of unequal treatment inherent in the 123 being

rehired through secret settlements, Petitioner was not afforded the same procedural rights and remedies as fellow U. S. Government employees (e.g. Washington, Bivens and Marshall). As a result Petitioner was denied a hearing on the unequal treatment by which they have been denied their rights under the Civil Service Reform Act and the Equal Protection provisions in the United States Constitution.

The federal courts are not strangers to similar cases of outrageous and invidious discrimination. For example, in the landmark Constitutional law case of Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064 (1886), San Francisco required by ordinance that all hand laundries be in brick or stone buildngs (rather than in cheaper frame

buildings) unless there was special permission granted by the Board of Supervisors. Chinese immigrants were denied permission for a variance, were convicted of violation of the city ordinance, and were sentenced to imprisonment. The United States Supreme Court held the Equal Protection guarantees of the Constitution were violated by such discrimination.

In the case at hand, the Government avoided compliance with the Yick Wo rule by concealing the evidence that will prove denial of equal treatment under the law and the Court of Appeals for the Federal Circuit decision sanctions that concealment. The secrecy in the settlements implies that the reason some strikers were reinstated was because some have more influence than

others at FAA.

Under the Civil Service Reform Act, at 5 U.S.C. 7701(c)(2), no Merit Systems Protection Board decision may be upheld where the employee or applicant

> (A) shows harmful error in the application of the agency's procedures in arriving at such decision;
>
> (B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or
>
> (C) shows that the decision was not in accordance with law.

Petitioner contended below that (A) they have been victims of harmful error in exclusion of materially relevant evidence of unequal treatment, that (B) the personnel decisions affecting them were tainted with prohibited personnel practices [violations of 5 U.S.C. §§ 2301(b)(2)

and (b)(8)(a) inherent in the secret settlement] and that (C) the decision was not in accordance with the law and administrative decisions of the MSPB relating to unequal penalties for equal offenses.

The language of the statute requires only one of these three elements be present for a decision to be overturned. In this case, all three elements were present, providing the Court below with strong and compelling grounds for reopening the record in the interest of justice. If the Civil Service Reform Act is to be "treated as a working instrument of government and not merely as a collection of English words," United States v. Dotterwich, 320 U.S. 277, 280, 64 S.Ct. 134, 136 (1943), unequal treatment of Government employees who commit similar offenses must be

remedied. Only in a new hearing will Petitioner's rights be protected through the introduction into evidence of the 123 secret settlements and other evidence of unequal treatment. Allowing the ruling of the Merit Systems Protection Board and Court of Appeals to stand would encourage government law breaking through the new tool of "secret settlements" the day after "equal" penalties have been imposed.

Petitioners have been wronged, because information about possible illegality, irregularity and fraud in the settlement of the claims of a minority of air traffic controllers has been kept out of the consideration of Petitioner's case. Petitioners sought to have their cases remanded with an order to allow them an opportunity to enage in further

discovery about the secret settlements. The Civil Service Reform Act very specifically gives federal courts this power to right wrongs:

> The court shall review the record for the purpose of determining whether the findings are in accordance with law, and whether the procedures required by statute and regulations were followed ... the findings of the Board are conclusive if supported by evidence in the record. **If the court determines that further evidence is necessary, it shall remand the case to the Board.** The Board, after such further proceedings as may be required, may modify its findings, and shall file with the court the record of such proceedings. The findings of the board are conclusive if supported by the evidence in the record as supplemented.

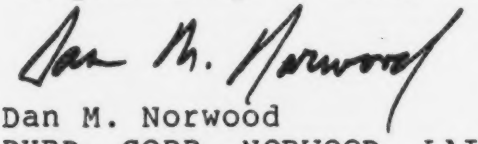
5 U.S.C. 7702. [Emphasis added] A remand on this crucial Civil Service Reform Act and constitutional law issue is indeed a very small price to

pay for assuring the honesty and integrity of the federal personnal system.

**CONCLUSION**

If we are to reach the "ideal justice" this Court referred to in Schapansky, Id. at 485, "secret settlements" of federal employee appeals of disciplinary actions must be prohibited and the decision below should be reviewed and reversed. For these reasons, Petitioners request the Court grant the writ of certiorari.

Respectfully submitted,



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October 1986

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was sent by regular mail, postage prepaid, this 16th day of October, 1986.

Solicitor General
Department of Justice
Washington, D.C. 20530

Sandra Spooner
Commercial Litigation Branch
Civil Division
Department of Justice
2nd Floor, Todd Building
Washington, D.C. 20530

Dan M. Norwood

# APPENDIX

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**UNITED STATES COURT OF APPEALS**
**FOR THE FEDERAL CIRCUIT**

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|---|---|---|
| D. SUZANNE BRUCE | * | |
| | * | |
| Petitioner, | * | |
| | * | |
| v. | * | Appeal |
| | * | No.85-1117 |
| | * | MSPB Docket |
| | * | No.DA075281F1887 |
| | * | |
| DEPARTMENT OF TRANSPORTATION, FAA, | * | |
| | * | |
| Respondent. | * | |

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Decided July 18, 1986

Before FRIEDMAN, Circuit Judge, BENNETT, Senior Circuit Judge, and BISSELL, Circuit Judge.

PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board, affirming the petitioner's removal by the Federal Aviation Administration, Department of Transportation, is affirmed.

**OPINION**

Petitioner Bruce brings this appeal asking the court to order the board to reopen the record below for discovery concerning certain alleged "secret settlements" entered into between the FAA and certain other air traffic controllers with situations allegedly similar to Bruce. The recent opinion of Bergh v. Department of Transportation, FAA, App. No. 85-1102 (Fed. Cir. July 2, 1986), decides this issue and prevents us from granting Bruce the requested relief.

**UNITED STATES OF AMERICA**

**MERIT SYSTEMS PROTECTION BOARD**

| | | |
|---|---|---|
| D. SUZANNE BRUCE | * | |
| | * | |
| V. | * | DOCKET NO. |
| | * | DA075281F1887 |
| | * | |
| DEPARTMENT OF TRANSPORTATION | * | |

**OPINION AND ORDER**

Appellant petitions for review from an initial decision of the Board's Dallas Regional Office sustaining her removal based on charges of strike participation and unauthorized absence.

In her petition for review, appellant asserts that new and material evidence is available that, despite due diligence, was not available when the record was closed. She cites testimony in a hearing subsequent to her own regarding the continued employment of a similarly

situated controller and of other controllers who violated the anti-strike statutes. Appellant also refers to several settlements, presumably between controllers and the agency, which allegedly show disparate treatment. Even if this information constitutes new evidence that appellant could not previously obtain, appellant has not offered sufficient evidence that the other controllers were in fact similarly situted; rather, she has merely alleged that they participated in a strike and are still employed by the agency. Without more, appellant has not shown that the allegedly new evidence is material to her claim of disparate treatment. The Board finds, therefore, that appellant has failed to establish a basis for review on the grounds of new and material evidence. 5 C.F.R. § 1201.115.

Appellant also asserts that the presiding official erred by retroactively applying the standard articulated in Schapansky v. Department of Transportation, MSPB Docket No. DA075281F1130 at 6 n.2 (October 28, 1982), for the establishing by the agency of a prima facie case of strike participation.[1] Appellant was aware of the Schapansky standard in preparing her petition for review but nonetheless, does not refer to any additional evidence or argument that would satisfy that standard. Thus, appellant's argument is without merit.

Appellant contends that the presiding official should have barred evidence and testimony concerning a phone conversation between appellant and her facility chief as violative of her fifth amendment rights.

Appellant's situation, however, did not rise to the level of a custodial interrogation in which her statements would be considered compelled for fifth amendment purposes. See Adams v. Department of Transportation, MSPB Docket No. NYO75281F0424 at 12-13 (April 25, 1983). Appellant, therefore, has failed to show that the presiding official committed reversible error in admitting the evidence and testimony of her phone conversation. Id.

Appellant contests the sufficiency of the notice of proposed removal, contending that it failed to inform her that she was being removed, not for strike participation and absence without leave, but for failure to return to work by her deadline shift. Although appellant's failure to meet her deadline resulted in the

filing of the charges, the charges were strike participation and AWOL. See Anderson v. Department of Transportation, MSPB Docket No. SLO752810347 at 7 (April 25, 1983). We find that the charges as alleged were sufficiently specific to apprise appellant of the reason for the charges and to provide her with an opportunity to repond thereto.

Appellant asserts that the presiding official erred in failing to find that she was improperly suspended during the notice period of her removal. It is not clear that appellant raised this issue before the presiding official. In any event, appellant has not shown that she unequivocally communicated her availability and desire to return to work to the agency, thereby failing to establish that she was ready, willing,

and able to return to work. See Martel v. Department of Transportation, MSPB Docket No. BNO75281F0558 at 6-7, 11 (April 25, 1983). Therefore, we find that appellant has not met her burden of proof as to the existence of a suspension over which the Board has jurisdiction under 5 U.S.C. § 7512(2).

Finally, Appellant contends that the presiding official should not have conducted the hearing after he received legal memoranda from the Board's Office of Special Counsel regarding the penalty for violation of the federal anti-strike statutes. Apparently, appellant is referring to research assistance memoranda prepared by the Board's Office of General Counsel. The Board has found nothing barring its Office of General Counsel from preparing such memoranda for use

by the Regional Offices. See Campbell v. Department of Transporation, MSPB Docket NO. DEO75281F0674 at 21 n.19 (April 25, 1983). Therefore, we find that appellant's argument is without merit.[2]

Accordingly, having fully considered appellant's petition for review and finding that it does not meet the criteria set forth at 5 C.F.R. § 1201.115, the BOARD DENIES the petition.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals

for the Federal Circuit, 717 Madison Place, N. W., Washington, D. C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

_____ Date

_____
Robert E. Taylor
Secretary

Washington, D.C.

**FOOTNOTES**

1 We find that the presiding official correctly determined that the agency established a prima facie case of appellant's strike participation, and did not misinterpret the Schapansky standard.

2 For the first time in her petition for review, appellant also raises allegations concerning the propriety of the President's "amnesty" program, the agency's authority to alter the Presidential deadline, the agency's commission of prohibited personnel

practices, and the unconstitutionality of the anti-strike statutes. We decline to consider these arguments on review since they were not raised below. See 5 C.F.R. § 1201.115.

The Board has resolved the additional issues raised by appellant in her petition for review in the following cases: Campbell v. Department of Transportation, MSPB Docket No. DEO75281F0674 at 4-5, 15-16 (April 25, 1983) (admissibility of hearsay) (notification of "deadline shift"); Noa v. Department of Transportation, NYO75281F0697 at 6-7 (April 25, 1983) (admissibility of hearsay); Schapansky v. Department of Transportation, MSPB Docket No. DAO75281F1130 at 10-12 (October 28, 1982) (reasonableness of the removal penalty, nexus, and efficiency of the service); Desiderio v. Department of

the Navy, 4 MSPB 171 (1980) (AWOL alone as cause for removal); Anderson v. Department of Transportation, MSPB Docket No. SLO75281F0347 at 8-13 (April 25, 1983) (effect of "command influence" on meaningful opportunity to reply) (invocation of 5 U.S.C. § 7513(b)(1) to shorten the notice period); Ketchem v. Department of Transportation, MSPB Docket No.1 DAO75281F0713 at 9 (May 28, 1982) (official notice period for strike), motion for clarification denied (November 23, 1982).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

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D. Suzanne Bruce,[1]

Appellant,

v. Docket No.DA075281F1887
Date: December 14, 1982

Department of Transportation,
Federal Aviation Administration,

Respondent.

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## DECISION

### Introduction

D. Suzanne Bruce filed an appeal with the Dallas Region of the Merit Systems Protection Board on September 9, 1981, from an action by the Department of Transportation, Federal Aviation Administration (FAA), removing her from the position of Air Traffic Control Specialist at the West Memphis Air Traffic Control Tower in West Memphis, Arkansas, effective August 22, 1981.

## Jurisdiction

A federal employee may appeal any action which is appealable to the Board under any law, rule, or regulation. 5 U.S.C. § 7701(a). Appellant was a competitive service employee, not serving a probationary period, and is therefore entitled to appeal a removal action to the Board. 5 U.S.C. §§ 7511 - 7514; 5 C.F.R. §§ 752.405; 1201.3(a)(1) (1982). Thus, the Board has appellate jurisdiction over this timely filed appeal.

## Analysis and Findings

On August 6, 1981, Gerald W. Graham, West Memphis Tower Chief, issued a letter to appellant proposing her removal for participation in a strike against the United States Government and unauthorized absence, beginning on August 4, 1981.[2] Following written and oral replies by appellant, on August 18, 1981, Graham

issued a decision advising appellant she would be removed effective August 22, 1981.

Pursuant to a pre-hearing discussion, the following stipulations were reached by the parties and made a part of the record in this case: (1) appellant signed an appointment affidavit, prior to August 3, 1981, wherein she swore that she was not participating in a strike against the Government of the United States or any agency thereof, and would not so participate while an employee thereof; (2) prior to July 31, 1981, appellant was aware of her work schedule for the week of August 2, 1981; (3) appellant did not request nor was she granted annual leave, sick leave, or excused absence for August 4 and 5, 1981.[3] Also, official notice was taken that the Professional Air Traffic

Controllers Organization (PATCO) was conducting an unlawful nationwide strike against FAA on the dates of August 4 through 6, 1981. See Ketchem v. FAA, MSPB Docket No. DA075281F0713 (May 28, 1982); 5 C.F.R. § 1201.67 (1982).

From the unrefuted evidence presented, i.e., the watch schedule, time and attendance records, personnel logs, and testimony of Chief Graham, it was established that appellant was scheduled to work on the dates of August 4 and 5, 1981, and that she did not report to work on those days. That uncontraverted evidence, along with the stipulated fact that appellant had not been granted leave, established that appellant was absent without authorized leave (AWOL) on the dates of August 4 and 5, 1981. See Moore v. Veterans Administration, 2 MSPB 247 (1980).

The terms "striking" and "participating in a strike" have been held to mean an actual refusal in concert with others to provide services to one's employer. United Federation of Postal Clerks v. Blount, 325 F.Supp. 879, 884 (D.D.C.), aff'd, 404 U.S. 802 (1971); Schapansky v. FAA, MSPB Docket No. DAO75281F1130 at 6 (October 28, 1982). The Board has stated that in a case in which the existence of a strike is a matter of general knowledge, the agency may establish a prima facie case of an employee's voluntary participation therein by presenting evidence of his/her unauthorized absence from duty during the strike. Id. In view of appellant's unauthorized absences on August 4 and 5, 1981, while an illegal strike by PATCO was in progress, I find the agency has presented a prima

facie case of appellant's participation in that strike. See id.

In Schapansky, the Board stated that once the agency has established a prima facie case, the burden of persuasion should then shift to the employee to rebut the agency's case by presenting evidence to show that she had no knowledge of the existence of the strike or to demonstrate that her absence was due to some factor other than intentional participation in the strike. Id. There is no evidence of record to rebut the agency's prima facie case of appellant's participation in the strike conducted by PATCO. Accordingly, I find the preponderance of the evidence supports that appellant voluntarily refused, in concert with others, to provide services to the FAA beginning at 2 p.m.. on August 4, 1981, at least

through August 5, 1981. Therefore, I find the charges stated in the notice of proposed removal that appellant participated in a strike against the Government and that she was absent without authorization are sustained.

Appellant argued that any consideration of evidence that she was picketing on August 3, 1981, her regularly scheduled day off, to support the charge of striking would violate her first amendment rights, and that any negative inference from her failure to testify or to admit or deny the charges in her reply to the agency would violate her right to remain silent under the fifth amendment. Although there was unrefuted evidence that appellant did participate in a PATCO picket line on August 3, 1981, consideration of that evidence was unnecessary and played a

part in sustaining the agency's charge of striking. The strike participation charge is supported by appellant's actual refusal, in concert with others, to provide services to the agency, as evidenced by her unauthorized absence during the strike. Id. Moreover, that prima facie case of striking is sufficient to establish the requisite preponderance because it is unrebutted by any evidence, not because of any negative inference from appellant's failure to deny the charges. See Johnson v. FAA, MSPB Docket No. DC075281F0998 (November 10, 1982); Schapansky, supra. Accordingly, I find appellant's arguments as to the first and fifth amendments are not material to this appeal.

Although I have found the charges to be supported by a preponderance of the evidence, an agency's decision to

remove an employee may not be sustained if the appellant successfully shows the decision was based on one of the affirmative defenses shown at 5 U.S.C. § 7701(c)(2).4 The burden of proof on all affirmative defenses rests on the party asserting the defense. 5 C.F.R. § 1201.56(b) (1982).

Appellant alleged that she had not received the statutory notice required by 5 U.S.C. § 7513. That statute provides that an employee against whom an action is proposed is entitled to at least thirty days advance written notice, unless there is reasonable cause to believe the employee committed a crime for which a sentence of imprisonment may be imposed; and further that the employee is entitled to a reasonable time, but not less than seven days to reply. 5

U.S.C. § 7513(b)(1),(2). Here, because appellant was absent without authorization while a nationwide PATCO strike was in progress, I find the agency had reasonable cause to believe appellant was on strike against the Government, a crime under 18 U.S.C. § 1918 for which a sentence of imprisonment can be imposed. Accordingly, I find the agency's invocation of the shortened notice period allowed by 5 U.S.C. § 7513(b) was proper. See Schapansky, supra, at 8. Because the charges against appellant were relatively simple in nature, I find that the seven days afforded by the agency for appellant to reply was a reasonable time in accordance with 5 U.S.C. § 7513(b)(2). Id.

Appellant also alleged that the agency had committed error by not

advising her in its proposed removal notice of the fifth amendment protection against self incrimination. The appellant, however, failed to show how the agency's failure to give such warning contsituted procedural error, and further, failed to show or even allege that such error, if it was error, was harmful.[5] Before an agency action may be reversed on the basis of harmful error, the appellant must show that the error was committed and that the error was harmful. Parker v. Defense Logistics Agency, 1 MSPB 489 (1980). Thus, I find appellant has failed to present sufficient evidence or argument that would warrant reversal of the agency's removal because it failed to give her any fifth amendment warning.

Although not an affirmative

defense, appellant also challenged the penalty of removal in her case. She argued that the removal was unreasonable, arbitrary, capricious, and an abuse of discretion. She further claimed, in several variously articulated arguments, that her removal did not promote the efficiency of the service.

A removal action may be taken against an employee for "such cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a). It is the agency's burden under 5 U.S.C. § 7701(c)(1)(B) to support that determination by a preponderance of the evidence. E.G. Ketterer v. Department of Agriculture, 2 MSPB 459 (1980). Under 5 U.S.C. § 7311, "[A]n individual may not accept or hold a position" in the federal government if he "participates in a strike against

the Government," and 18 U.S.C. § 1918 reiterates the provisions of 5 U.S.C. § 7311 and makes a violation therof a crime. I find that disciplinary action for a violation of the provisions of those statutes, as well as a charge of absence without leave, constitutes such cause as will promote the efficiency of the service. Schapansky, supra, at 11. Moreover, the highly sensitive and important nature of an air traffic controller's position, the fact that appellant was advised in advance of the illegality and possible consequences of striking, her refusal to avail herself of the opportunity to return to work without facing termination, [6] together with the seriousness of the offense as indicated by the statutes prohibiting striking, provide overwhelming reasons to support that removal is an

appropriate penalty. I find that appellant's removal from employment with the FAA for striking against the United States Government is clearly within the tolerable limits of reasonableness. Johnson, supra, at 16; Schapansky, supra, at 11; see Douglas v. Veterans Administration, MSPB Docket No. ATO75299006 (April 10, 1981). Therefore, upon consideration of all evidence and arguments presented in this case, I find the agency's decision is sustained under 5 U.S.C. § 7701(c).

**Decision**

The agency's removal of appellant on August 22, 1981, is AFFIRMED.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on January 19, 1983, unless a petition for review is filed

with the Board or the Board reopens the case on its own motion.

Any party to the proceeding, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The petition for review must set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be filed with the Secretary of the Merit Systems Protection Board, Washington, D. C. 20419, no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established that:

(a) New and material evidence is available that, despite due diligence, was not available when the record was closed, or,

(b) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Pursuant to 5 U.S.C. § 7703(b)(1) [7] the appellant has the right to seek judicial review of the Board's final decision on this appeal. A petition requesting such review must be filed with the United States Court of Appeals for the Federal Circuit no later than 30 days after appellant's receipt of the Board's final order or decision.

FOR THE BOARD:

WILLIAM W. CARNES
Presiding Official

**FOOTNOTES**

1 This appeal was previously consolidated in the appeal of Norris et al v. FAA, Docket No. DA075281F1321.

2 In summary, the notice alleged that appellant participated in a strike against the United States Government from 2 p.m., August 4, 1981, through the date of the issuance of the proposal notice in violation of 5 U.S.C. § 7311 and 18 U.S.C. § 1918, and that she was absent without authorization for that time period.

3 Parties may stipulate as to any matter and such stipulations satisfy any burden of proof thereon. 5 C.F.R. § 1201.66 (1982). In an adverse action appealed to the Board, the

agency has the burden of proof for supporting its reason for the action by a preoponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B). A preponderance of the evidence is, "That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true." 5 C.F.R. § 1201.56(c)(2) (1982).

4 Under 5 U.S.C. § 7701(c)(2), the agency's decision may not be sustained if the appellant:

(1) shows harmful error in the application of the agency's procedures in arriving at such decision;

(2) shows that the decision was based on any prohibited personnel practice described in 5 U.S.C. §

2302(b); or

(3) shows that the decision was not in accordance with law.

5 Harmful error is, "Error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. . . ." 5 C.F.R. § 1201.56(c)(3) (1982).

6 Pursuant to President Reagan's announcement that controllers absent from work without authorization would have a grace period to report to avoid being considered on strike and termination action initiated, the FAA had established a deadline for each controller to return to work as that controller's first scheduled shift beginning at or after 11:00 a.m. EDT,

on August 5, 1981. See Schapansky, supra, at 11. The documents and testimony in this case reflect that appellant's deadline was her scheduled shift beginning at 10:00 a.m. CDT, August 5, 1981.

7 As modified by Section 127 of the Federal Courts Improvement Act of 1982, to be codified at 28 U.S.C. § 1295(a)(9).

No.

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**IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1986**

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| P. M. BERGH, et al | * | Appeal No. |
| | * | 85-1102 |
| MILTON C. | * | Appeal No. |
| CROISSANT, et al | * | 85-1103 |
| LARRY L. JOHNSON, | * | Appeal No. |
| et al, | * | 85-1106 |
| JOHN C.HOLEN, | * | Appeal No. |
| et al | * | 85-1108 |
| MYRON L. THOMSON, | * | Appeal No. |
| et al | * | 85-1240 |
| JOHN W.KARR, et al, | * | Appeal No. |
| | * | 85-1241 |
| STUART F. ETTER, | * | Appeal No. |
| et al, | * | 85-1242 |
| MELVIN L.BEEBE, | * | Appeal No. |
| et al, | * | 85-1243 |
| WILLIAM C. | * | Appeal No. |
| JOHNSON, et al, | * | 85-1245 |
| | * | |
| v. | * | |
| | * | |
| DEPARTMENT OF | * | |
| TRANSPORTATION,FAA | * | |
| | * | |
| Respondent. | * | |

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DECIDED: July 2, 1986

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Before FRIEDMAN, SMITH, and BISSELL, Circuit Judges, FRIEDMAN, Circuit Judge.

In this petition for review, former air traffic controllers challenge the decisions of the Merit Systems Protection Board (Board) upholding their removal by the Federal Aviation Administration (Administration) for participating in the illegal 1981 strike on various grounds. A major contention is that the Administration acted improperly by reinstating other controllers whom it also had removed for striking but not reinstating the petitioners. We reject the petitioners' challenges to the decisions of the Board and affirm them.

I.

Counsel for the petitioners requested oral arguments. We determined, however, that all but one of the issues the petitioners raised

have been authoritatively decided in our previous decisions, that the facts and legal arguments were adequately presented in the briefs and record, and that the decisional process woudl not have been aided by oral argument. Fed. R. App. P. 34(a). We heard oral argument on the issue whether the Administration acted improperly in reinstating some, but not all, of the fired controllers.

II.

A. the parties stipulated that "[t]he FAA nationwide has reinstated some air traffic controllers/appellants who were removed for participation in the [air traffic controllers] strike pursuant to settlement agreement." The petitioners argue that the agency "violated MSPB principles and fundamental fairness by reinstating

some controllers found guilty of striking, for no reason which can be discerned from the record." They cite Douglas v. Veterans Administration, 5 MSPR 280 (1981), and Woody v. General Services Administration, 6 MSPR 468 (1981), for the proposition that "where an appellant raises an allegation of disparate treatment in comparison to specified employees, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld." Woody, 6 MSPR at 488 (citing Douglas, 5 MSPR at 306-07). The Petitioners assert that the agency "has provided no explanation, much less any evidence, as to why it vacated its findings and dismissed its charges against the reinstated controllers while denying petitioners this benefit."

Woody and Douglas, however, are inapposite because they deal solely with the question whether the penalty the agency selected was proper. The alleged disparate treatment here, however, does not involve any difference in the penalty imposed upon different employees -- all the air traffic controllers involved were removed -- but turns upon the propriety of the Administration's settling some of the cases before the Board by reinstating some controllers, and not explaining the reasons why it also did not enter into like settlements with the petitioners.

The agency has given the following explanation in its brief of the process by which, and the reasons why, it determiined to settle some of the cases but not those of the petitioners:

> The FAA conducted an in-depth analysis of each of the 11,000 cases of the removed air traffic controllers in preparation for the litigation before the MSPB. As part of the litigation strategy, the FAA undertook an analysis of the strengths and weaknesses of each case. Based on this individualized analysis, the agency made decisions to enter into settlement negotiations with certain air traffic controllers whose appeals were pending. As part of this analysis, the FAA also reviewed the individual cases of the petitioners and made individual determinations that settlement was not warranted in these cases. The agency embarked on the litigation analysis in order to best prepare its cases for hearings, not under any policy to settle cases. The cases selected for settlement were those whose examination demonstrated to the FAA that further litigation would not be successful.

We know of no principle that precludes the government from settling, upon whatever terms it deems suitable, cases in which it determines

that the likelihood of success is so low as to make continued litigation inappropriate. The decision whether to settle a particular case and upon what terms is a matter particularly within the discretion of the agency conducting the litigation. The agency was not required to give detailed reasons in each particular case concerning the facts that led it to settle rather than to litigate, as the petitioners apparently would require it to do. The agency's statement that based upon "an analysis of the strengths and weaknesses of each case", it decided not to conduct "further litigation" of those cases where the analysis indicated that such litigation "would not be successful", was a sufficient explanation for the settlements the government made.

The law favors settlement of

cases. United States v. Contra Costs County Water District, 678 F. 2d 90, 92 (9th Cir. 1982); Stotts v. Memphis Fire Department, 679 F. 2d 541, 565 (6th Cir. 1982); Airline Stewards & Stewardesses Association, Local 550, TWU, AFL-CIO v. American Airlines, 573 F.2d 960, 963 (7th Cir. 1978); Florida Trailer & Equipment Co. v. Deal, 284 F.2d 567, 571 (5th Cir. 1960); Fed. R. Evid. 408 advisory committee note. The government is to be commended, not criticized, for deciding not to litigate those of the vast number of air traffic contoller cases pending before the Board in which it concluded that its likelihood of success was so small as to make continued litigation unwise.

B. The petitioners next contend that the Administration denied them equal protection because, due to

friendship or personal favoritism, Administration officials notified other air traffic controllers, but not the petitioners, of their deadline shift for reporting to work. They rely upon Olshock v. Village of Skokie, 411 F. Supp. 257 (N.D. 111), aff'd, 541 F.2d 1254 (7th Cir. 1976). In Olshock, during a police officers strike the Village of Skokie took an informal poll to determine which officers might return to work. Those who said they would do so were notified that if they reported by a specific date, they would not be discharged, but merely suspended. The court held that

> [t]he failure of defendants to give all the 59 striking policemen notice that they would not be discharged if they reported for duty in uniform on or prior to July 13, 1975, and the failure of defendants to give said

> notice to the plaintiffs herein, constituted a failure to provide equal protection of the laws to plaintiffs within the meaning of and as required by the Fourteenth Amendment to the United States Constitution . . . .

Id. at 265.

The rationale of Olshock was that the Village unfairly had discriminated against those officers who were not notified that if they reported by the deadline, they would not be discharged, in favor of those who were notified. In that situation, the non-notified officers were not aware of the deadline and the consequences of failing to meet it. The air traffic controllers, however, were in a quite different situation, for we have held that

> [e]ach petitioner knew when his next regularly scheduled shift commenced and elected

> not to show up at that time. Having disregarded the initial 48 hour moratorium, petitioners can hardly complain that they were not specifically and personally notified that each had an opportunity to also disregard an extension of that moratorium.

Adams v. Department of Transportation, FAA, 735 F.2d 488, 491 (Fed. Cir.), cert denied, 105 S. Ct. 432 (1984).

The petitioners argue, however, that even if the Administration was not required to notify all the air traffic controllers of their deadline shifts, it could not selectively notify some but not others. The petitioners point out that Mr. Helms, the administrator of the agency, issued a "directive" that supervisors should encourage their friends to come back to work.

The Helms statement, however, did not relate to notifying controllers of their deadline shifts, but only urged supervisors to encourage controllers with whom they were friendly to return to work. In his testimony Mr. Cox, a supervisor at one of the towers involved, explained the scope and purpose of the Helms statement:

> Q. Now in this telecon, Mr. Helms advised that he did not want supervisors to be calling controllers as supervisors, is that right?
>
> A. That was not a directive. He suggested that the Agency -- he said the Agency was not going to instruct supervisors to make calls as supervisors to their people.
>
> Q. So he said that as far as the Agency's position was concerned, as a supervisor you were not being directed to call --
>
> A. That's correct.
>
> Q. Controllers, is that correct? But he did say that the Agency was

suggesting that supervisors call controllers as personal friends?

A. I think that's a little liberal. My interpretation of what I heard was that if you felt, and if you were concerned about these people as friends -- he wasn't suggesting to call everybody as a friend. What he was saying is that if you had someone you were especially concerned about as a friend, that you could be influential with and answer questions, go ahead and give him a call.

C. The petitioners argue that the Administration "erroneously decided that 5 U.S.C. Section 7311 require[d] dismissal of any employee found guilty of striking." whereas that statute permitted the agency to impose a lesser penalty. We rejected a similar contention in Schapansky v. Department

of Transportation, FAA, 735 F.2d 477 (Fed. Cir.), cert denied, 105 S. Ct. 432 (1984), where we ruled that

> [w]hether removal is mandatory under 5 U.S.C. § 7311 or 18 U.S.C. § 1918 need not be here decided. Removal is permissible under those statutes and no statute prohibits removal of any who strike against the United States.

Id. at 485.

Similarly, in the present case we cannot find that the Administration abused its discretion or otherwise acted improperly in concluding that the appropriate penalty for the petitioners' illegally striking against the government was removal.

D. Two of the petitioners (Burkette, No. 85-1102, and Johnson, No. 85-1245) contend that their failure to report for work resulted

not from participating in the strike but because they were confused about their deadline shift for reporting. We have rejected similar claims in Anderson v. Department of Transportation, FAA, 735 F.2d 537 (Fed. Cir.), cert. denied, 105 S. Ct. 432 (1984); Adams v. Department of Transportation, FAA, 735 F.2d 488 (Fed. Cir), cert. denied, 105 S. Ct. 432 (1984); and Dorrance v. Department of Transportation, FAA, 735 F.2d 516 (Fed. Cir.), cert. denied, 105 S. Ct. 432 (1984). For the reasons given in those opinions, we also reject the claim here.

The decisions of the merit Systems Protection Board upholding the removal of the petitioners are affirmed.

AFFIRMED